

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

OCTOBER TERM, 1938.

No. 7311

400

THE CITY BANK, APPELLANT,

vs.

HAMILTON NATIONAL BANK OF WASHINGTON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED DECEMBER 29, 1938

PRINTED FEBRUARY 3, 1939

United States Court of Appeals for the District of Columbia

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No. 7311

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vs.

HAMILTON NATIONAL BANK OF WASHINGTON,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

a In the District Court of the United States
for the District of Columbia

No. 89911 At Law

HAMILTON NATIONAL BANK OF WASHINGTON, a corporation,
Plaintiff,

v.

THE CITY BANK, a corporation, *Defendant.*

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the
United States for the District of Columbia, at the
City of Washington, in said District, at the times
hereinafter mentioned, the following papers were
filed and proceedings had, in the above-entitled
cause, to wit:—

1 *Amended Declaration*

Filed April 20 1938

In the District Court of the United States
for the District of Columbia

Law No. 89,911

HAMILTON NATIONAL BANK OF WASHINGTON, a corporation,
14th and G Streets, N. W., Washington, D. C., *Plain-
tiff,*

v.

THE CITY BANK, a corporation, 9th Street & Mt. Vernon
Pl., N. W., or 3608 Georgia Avenue, N. W., Washington,
D. C., *Defendant.*

First Count

The plaintiff, Hamilton National Bank of Washington,
which is a corporation organized under the National Bank-

ing Laws, and which carries on a banking business in the District of Columbia, sues the defendant, The City Bank, which is a corporation, and which carries on a banking business in the District of Columbia, for that the plaintiff, on, to-wit, November 16, 1936, at the instance and request of one Arthur Berman, discounted a certain promissory note signed by said Arthur Berman as maker, and also purporting to have been signed by one Bernice Berman, by the name and style of Mrs. Bernice Berman as maker, payable to plaintiff in the full sum of \$1,213.20, in the following installments: \$33.70 on January 2, 1937, and a like amount on the 2nd day of each succeeding month until said note was paid in full, principal and interest. A copy of said promissory note is set out in the bill of particulars to this count of the declaration. Upon the discount of said promissory note as aforesaid, plaintiff issued its cashier's check for the proceeds of said discount, in the sum of \$1,080.00, dated November 16, 1936, and payable to

2 the order of said Arthur Berman and Bernice Berman. Thereafter said cashier's check, endorsed with the names of the payees thereof, was deposited in defendant bank, in its Georgia Avenue branch, and by defendant was stamped:

“Pay to the order of
The Riggs National Bank
of Washington, D. C.
Prior Endorsements Guaranteed
The City Bank
Georgia Ave. Office”,

and was collected by defendant bank from the plaintiff, and plaintiff, in paying said check, relied upon the aforesaid endorsement and guarantee of defendant. A copy of said cashier's check is set out in the bill of particulars to this count of the declaration. Plaintiff says that said Arthur Berman paid or caused to be paid upon the promissory note aforesaid the sum of \$370.70, leaving a balance due thereon of \$842.50; that said Arthur Berman died on, to-wit, the 19th day of November, 1937, at which time the aforesaid balance of \$842.50 was unpaid; that the purported signature of said Bernice Berman, by the name and style of Mrs. Bernice Berman, as maker of said promissory note,

and her purported endorsement of the aforesaid cashier's check, are forgeries, and were not placed upon said instruments by her, or with her knowledge, consent or approval, wherefore, she has declined to pay the aforesaid balance of \$842.50, or any part thereof, or any interest thereon; and plaintiff says that no part of the aforesaid balance of \$842.50, nor any interest thereon, has been paid.

WHEREFORE, plaintiff brings this suit, and claims to recover from defendant the full sum of \$842.50 and costs of this suit.

Second Count

3 The plaintiff, Hamilton National Bank of Washington, which is a corporation organized under the National Banking Laws, and which carries on a banking business in the District of Columbia, further sues the defendant, The City Bank, which is a corporation, and which carries on a banking business in the District of Columbia, for that the plaintiff, on, to-wit, August 10, 1937, at the instance and request of one Arthur Berman, discounted a certain promissory note signed by said Arthur Berman as maker, and also purporting to have been signed by one Bernice Berman as maker, payable to plaintiff on August 2, 1940, in the full sum of \$511.92, with interest at the rate of 6% per annum after maturity of said note until paid, and as collateral security for the payment of said note there was assigned to plaintiff a certain coupon deposit book, and it was further agreed in and by the terms of said note that in the event of a default in the payment of any of the deposits agreed to be made in said coupon deposit book at the time therein specified, the whole of the principal of said note, at the option of the holder thereof, should become immediately due and payable. Said note further provided that a deposit should be made in said coupon deposit book in the amount of \$14.22 on the 2nd day of September, 1937, and a like amount on the 2nd day of each and every month thereafter until said note had been paid in full. A copy of said promissory note is set out in the bill of particulars to this count of the declaration. Upon the discount of said promissory note as aforesaid, plaintiff issued its cashier's check for the proceeds of said discount, in the

sum of \$420.00, dated August 10, 1937, and payable to the order of said Arthur Berman and Bernice Berman. Thereafter said cashier's check, endorsed with the names of the payees thereof, was deposited in defendant bank, in its Georgia Avenue branch, and by defendant bank was stamped:

4 “Pay to the order of
 The Riggs National Bank
 of Washington, D. C.,
 Prior Endorsements Guaranteed
 The City Bank
 Georgia Ave. Office”

and was collected by defendant bank from the plaintiff, and plaintiff, in paying said check, relied upon the aforesaid endorsement and guarantee of defendant. A copy of said cashier's check is set out in the bill of particulars to this count of the declaration. Plaintiff says that said Arthur Berman paid or caused to be paid upon the promissory note aforesaid the sum of \$42.66, leaving a balance due thereon of \$469.26; that said Arthur Berman died on, to-wit, the 19th day of November, 1937, at which time the aforesaid balance of \$469.26 was unpaid; that the purported signature of said Bernice Berman, as maker of said promissory note, and her purported endorsement of the aforesaid cashier's check, are forgeries, and were not placed upon said instruments by her, or with her knowledge, consent or approval, wherefore she has declined to pay the aforesaid balance of \$469.26, or any part thereof, or any interest thereon; and plaintiff says that no part of the aforesaid balance of \$469.26, nor any interest thereon, has been paid.

WHEREFORE, plaintiff brings this suit, and claims to recover from defendant the full sum of \$469.26 and costs of this suit.

Plaintiff claims to recover from defendant under both counts of this suit the full sum of \$1,311.76 and costs of suit.

WHITEFORD, MARSHALL,
HART & CARMODY
By P. H. MARSHALL
Attorneys for plaintiff

We consent—

L HAROLD SOTHORON

P MICHAEL COOK

Attorneys for defendant—

Leave to file granted:

F. DICKINSON LETTS

Justice.

5

Bill of Particulars

Filed February 25 1938

*

*

*

As to First Count

Copy of note:

COPY

\$1213.20

Washington, D. C., November 16, 1936

For value received we promise to pay to the order of Hamilton National Bank Twelve hundred thirteen and 20/00 Dollars, with interest at the rate of per cent per annum after maturity, negotiable and payable at the Hamilton National Bank of Washington, D. C., in the following installments: \$33.70 on January 2, 1937 and \$33.70 on the second day of each succeeding month until December 2, 1939 inclusive and \$. on and further agree that failure in the payment of any installment shall render the entire note due and payable on demand at the option of the holder. The maker or makers further agree to pay a charge of five cents per dollar on each installment more than fifteen days in arrears, but not to exceed \$5 in respect of any one such late installment, and if this note or any installment thereon is not paid at its maturity, to pay all costs of collection including cost of suit and fifteen per cent of the amount in default as an attorney's fee. This note is made in accordance with the provisions of the National Housing Act and under regulations of the Federal Housing Administration.

The late charge shall not exceed \$5.00

(signed) ARTHUR BERMAN

27803

(signed) MRS. BERNICE BERMAN

Title-I-Series-II

Address 4328 Ga. Ave.

Copy of check:

“HAMILTON NATIONAL BANK 15-15/5
Main office—Fourteenth and G Streets, N. W.

Washington, D. C. Nov. 16, 1936 No. M12587

Pay to the order of

Arthur Berman & Bernice Berman * * * * \$1080.00

Exactly \$1,080.00 cts.

Cashier's check

G-2

R. A. SISSON,
A. Cashier”

6 Endorsements on back of check:

“Arthur Berman
Bernice Berman
Arthur Berman

Pay to the order of
The Riggs National Bank
of Washington, D. C.
Prior Endorsements Guaranteed
The City Bank
Georgia Ave. Office.

Received Payment Through
The Washington, D. C.
Clearing House
Prior Endorsements Guaranteed
The Riggs National Bank
15-3 Nov 17 1936 15-3
of Washington, D. C.”

Amount claimed hereunder—\$842.50—and costs.

As to Second Count

Copy of note:

COPY

No. 606

\$511.92

Washington, D. C., August 10, 1937

August 2, 1940 after date, for value received, we jointly and severally promise to pay, without defalcation, to the order of

HAMILTON NATIONAL BANK OF WASHINGTON

at its banking house at 14th and G Streets, N. W., in Washington, D. C., Five hundred and eleven 92/100 Dollars, with interest at the rate of six per cent, per annum AFTER MATURITY OF THIS NOTE until paid, and as collateral security for the payment of this note, and also as collateral security for the payment of any and all other present or future demands of any and all kinds of the said bank against the undersigned, or of any of them, they hereby assign to said bank the account of the undersigned borrower with said bank, as evidenced by coupon deposit book number 606, and also said coupon deposit book, and any and all money now deposited or hereafter deposited to the credit of the aforesaid account. The borrower agrees to deposit promptly to the credit of said account the sum of Fourteen 22/100 Dollars (\$14.22) on September 2, 1937, and an equal amount at regular monthly intervals thereafter, or at such other times as may be mutually agreed upon between said bank and any of the undersigned, until the total of said deposits shall equal the sum agreed to be paid to said bank, as evidenced by this note, and all co-makers of the borrower jointly and severally agree to make each of said deposits promptly if the borrower should default in making the same.

Upon failure to make any deposit as herein agreed, or in the event of the death of the borrower, or in case of insolvency, bankruptcy, or failure in business of any of the undersigned, or of an application for the appointment of a Receiver for the property of, or the making of an assignment for the benefit of creditors by, or the issuance of an attachment or the entry of a judgment against any of the undersigned, then and in such event this note shall, at the option of the holder thereof, immediately become due and payable without demand or

notice. Any failure by the holder to exercise any right hereunder shall not be construed as a waiver of the right to exercise the same or any other right at any time and from time to time thereafter. Upon the maturity of this note in accordance with any of its terms and provisions, the amount due thereon shall be charged against the afore-said account of the borrower, and if the same shall not be sufficient or available to satisfy the indebtedness in full, the undersigned co-makers shall be and remain jointly and severally liable for such unpaid indebtedness.

This deposit of collateral security is without prejudice to the right of the holder of this note to enforce collection of the same by suit or any other lawful manner.

Each of the undersigned hereby severally waives the benefit of any and all HOMESTEAD EXEMPTION or OTHER EXEMPTION as to the debt represented by this note, and further expressly agrees that if this note is placed in the hands of an attorney for collection, whether suit is brought thereon or not, to pay an attorney's fee of fifteen (15%) per cent. of the amount then due thereon, and that \$10.00 shall be the minimum of such fee.

Signatures (write in full):

Addresses (give complete residential address):

(1) Borrower:

(signed) ARTHUR BERMAN

4328-Georgia Ave., N. W.

(2) Wife of Borrower:

(signed) BERNICE BERMAN

4328-Georgia Ave., N. W.

Copy of check:

"HAMILTON NATIONAL BANK 15-15/5
Main office—Fourteenth and G Streets, N. W.

Washington, D. C. August 10th. 1937

G-2

No. M17002

Pay to the order of

Arthur and Bernice Berman * * * * \$420.00

Exactly \$420 & 00 cts.

Cashier's Check

F. P. HARMAN, JR.
A. Vice President"

Endorsements on back of check:

“Arthur Berman
Bernice Berman

Pay to the order of
The Riggs National Bank
of Washington, D. C.
Prior Endorsements Guaranteed
The City Bank
Georgia Ave. Office

8 Received Payment Through
The Washington, D. C.
Clearing House
Prior Endorsements Guaranteed
The Riggs National Bank
15-3 Aug 11 1937 15-3
of Washington, D. C.”

Amount claimed hereunder—\$469.26—and costs.

Amount claimed under both counts—\$1,311.76

WHITEFORD, MARSHALL,
HART & CARMODY

By P. H. MARSHALL
Attorneys for plaintiff.

Demurrer

Filed April 16 1938

*

*

*

Now comes the defendant, by its attorneys, and says that the declaration and each count thereof filed by the plaintiff herein is bad in substance.

QUINTER AND SOTHORON

By L. HAROLD SOTHORON
P MICHAEL COOK
Attorneys for Defendant

Among the points of law intended to be argued at the hearing of the foregoing demurrer are:

(1) The declaration and each count thereof does not on its face state a cause of action.

(2) The declaration and each count thereof does not allege any loss or damage to the plaintiff by reason of the alleged forged endorsement on the checks.

(3) And for other matters apparent on the face of the record.

QUINTER AND SOTHORON
By L HAROLD SOTHORON
P MICHAEL COOK
Attorneys for Defendant

9 *Memorandum*

MAY 3-1938.

Counsel have agreed that the demurrer filed to the original declaration shall stand as a demurrer to the declaration as amended.

District Court of the United States for the
District of Columbia

Tuesday, June 21, 1938.

Session resumed pursuant to adjournment, Hon. Jennings Bailey, Justice, presiding.

* * *

Upon consideration of the demurrer filed herein, to the declaration, it is ordered that said demurrer be, and the same is hereby overruled, with leave to plead within ten days if so advised.

To the foregoing order an exception is duly noted and allowed.

Plea

Filed September 15 1938

* * *

First Count

Comes now the defendant, by its attorneys, and for plea to the first count of plaintiff's declaration says that plaintiff ought not to have and maintain its said supposed cause

of action, for that, on, to-wit, November 16, 1936, the plaintiff, at the instance and request of one Arthur Berman, discounted a certain promissory note payable to the order of the plaintiff in the sum of \$1,213.20, payable in instalments of \$33.70 on the 2nd day of January, 1937, and \$33.70 on the 2nd day of each succeeding month thereafter until and including December 2nd, 1939, which said note had
10 the names "Arthur Berman" and "Mrs. Bernice Berman" written thereon as makers thereof; that the plaintiff, in disbursing the proceeds of the aforesaid note, executed and delivered to the said Arthur Berman its cashier's check dated November 16, 1936, in the sum of \$1,080.00, with the names "Arthur Berman & Bernice Berman" written thereon as payees thereof; that the said Arthur Berman, on, to-wit, November 17, 1936, deposited the aforesaid cashier's check for collection in the Georgia Avenue Branch of this defendant bank, at which time, on the back of said cashier's check, were written the names "Arthur Berman", "Bernice Berman", and "Arthur Berman"; that this defendant endorsed the said cashier's check and guaranteed prior endorsements, and received \$1,080.00 in payment thereof from the plaintiff through The Washington, D. C. Clearing House, and credited the said sum to the account of the said Arthur Berman, subject to his order, which said account was opened with this defendant by the said Arthur Berman several years prior to the aforesaid transaction; that all of said sum was withdrawn by the said Arthur Berman or on his order prior to the filing by plaintiff of this action and before this defendant had any notice or knowledge of any of the things or matters complained of by the plaintiff in the first count of the said declaration; that the name "Bernice Berman" written on the aforesaid promissory note as maker as aforesaid, and written on the aforesaid cashier's check as payee and endorser as aforesaid, is the name used by the wife of Arthur Berman and by which name she is known; that the plaintiff made no inquiry of the said Bernice Berman as to whether she had signed as maker or authorized the signing of her name as maker to the aforesaid promissory note; that plaintiff made no inquiry of the said Bernice Berman as to whether she had signed her name as endorser or authorized the signing of her name as endorser

on the aforesaid cashier's check; that this defendant had no notice or knowledge of the alleged forged endorsement on the said cashier's check until a short time before this suit was filed, which was more than eleven months after the payment of said check by the defendant; that neither the said Bernice Berman nor anyone claiming under her has asserted any claim against the plaintiff or this defendant for the proceeds of the aforesaid cashier's check or any part thereof; that the defendant paid the proceeds of said cashier's check to or on the order of the identical person, to-wit, Arthur Berman, who wrote the names "Arthur Berman" and "Mrs. Bernice Berman" on the aforesaid promissory note discounted by the plaintiff as aforesaid; that the defendant paid the proceeds of said cashier's check to or on the order of the identical person, to-wit, Arthur Berman, who the plaintiff intended should receive the proceeds of the aforesaid discounted note. This defendant further alleges on information and belief, and expects to prove at the trial hereof, that the said Arthur Berman wrote the name "Mrs. Bernice Berman" on the aforesaid promissory note as maker, and on the aforesaid cashier's check as endorser, and that the said Arthur Berman paid or caused to be paid to the plaintiff on account of the aforesaid promissory note the sum of \$370.00; that the plaintiff has suffered no loss or damage by reason of any act of this defendant, and the defendant further alleges that the loss or damage, if any, sustained or to be sustained by the plaintiff, results from its act in lending the aforesaid sum of \$1,080.00 on the aforesaid promissory note in the sum of \$1,213.70, without making proper or sufficient inquiry as to the genuineness of the signatures on the aforesaid promissory note.

WHEREFORE, by reason hereof, this defendant prays judgment if the said plaintiff ought to have or maintain its aforesaid action against this defendant.

12

Second Count

Comes now the defendant, by its attorneys, and for plea to the second count of plaintiff's declaration says that plaintiff ought not to have and maintain its said supposed cause of action, for that, on, to-wit, August 10, 1937, the

plaintiff, at the instance and request of one Arthur Berman, discounted a certain promissory note payable to the order of the plaintiff in the sum of \$511.92, payable on August 2, 1940, which said note had the names "Arthur Berman" and "Bernice Berman" written thereon as makers thereof; that the plaintiff, in disbursing the proceeds of the aforesaid note, executed and delivered to the said Arthur Berman its cashier's check dated August 10th, 1937, in the sum of \$420.00, with the names "Arthur and Bernice Berman" written thereon as payees thereof; that the said Arthur Berman, on, to-wit, August 11, 1937, deposited the aforesaid cashier's check for collection in the Georgia Avenue Branch of this defendant bank, at which time on the back of said cashier's check were written the names "Arthur Berman" and "Bernice Berman"; that this defendant endorsed said cashier's check and guaranteed prior endorsements, and received \$420.00 in payment thereof from the plaintiff through The Washington, D. C. Clearing House, and credited the said sum to the account of the said Arthur Berman, subject to his order, which said account was opened with this defendant by the said Arthur Berman several years prior to the aforesaid transaction; that all of said sum was withdrawn by the said Arthur Berman or on his order prior to the filing by plaintiff of this action and before this defendant had any notice or knowledge of any of the things or matters complained of by the plaintiff in the second count of the said declaration; that the name "Bernice Berman" written on the aforesaid promissory note as maker as aforesaid, and written on the aforesaid cashier's check as payee and endorser as aforesaid,

13 is the name used by the wife of Arthur Berman and by which name she is known; that the plaintiff made no inquiry of the said Bernice Berman as to whether she had signed as maker or authorized the signing of her name as maker to the aforesaid promissory note; that plaintiff made no inquiry of the said Bernice Berman as to whether she had signed her name as endorser or authorized the signing of her name as endorser on the aforesaid cashier's check; that this defendant had no notice or knowledge of the alleged forged encorsement on the said cashier's check until a short time before this suit was filed, which was more than four months after the payment of the said check by

the defendant; that neither the said Bernice Berman nor anyone claiming under her has asserted any claim against the plaintiff or this defendant for the proceeds of the aforesaid cashier's check or any part thereof; that the defendant paid the proceeds of said cashier's check to or on the order of the identical person, to-wit, Arthur Berman, who wrote the names "Arthur Berman" and "Bernice Berman" on the aforesaid promissory note discounted by the plaintiff as aforesaid; that the defendant paid the proceeds of said cashier's check to or on the order of the identical person, to-wit, Arthur Berman, who the plaintiff intended should receive the proceeds of the aforesaid discounted note. This defendant further alleges on information and belief, and expects to prove at the trial hereof, that the said Arthur Berman wrote the name "Bernice Berman" on the aforesaid promissory note as maker, and on the aforesaid cashier's check as endorser, and that the said Arthur Berman paid or caused to be paid to the plaintiff on account of the aforesaid promissory note the sum of \$42.66; that the plaintiff has suffered no loss or damage by reason of any act of this defendant, and defendant further alleges that the loss or damage, if any, sustained or to be sustained by the plaintiff, results from its act in lending the aforesaid sum of \$420.00 on the aforesaid promissory note in the sum of \$511.92, without making proper or sufficient inquiry as to the genuineness of the signatures on the aforesaid promissory note.

WHEREFORE, by reason hereof, this defendant prays judgment if the said plaintiff ought to have or maintain its aforesaid action against this defendant.

QUINTER AND SOTHORON
By L HAROLD SOTHORON
P. MICHAEL COOK
Attorneys for Defendant

Plaintiff's Motion for Judgment on Pleadings

Filed September 21 1938

*

*

*

Comes now the plaintiff, Hamilton National Bank of Washington, a corporation, and moves for a judgment in

favor of this defendant upon the pleadings filed herein, and for grounds of this motion states as follows:

1. The allegations contained in the pleas of the defendant to the first and second counts of the amended declaration heretofore filed herein fail to allege any facts constituting a defense to the first and second counts of the amended declaration filed herein, or to either of said counts.

2. The supposed defenses set forth in the pleas aforesaid were, in effect, decided adversely to defendant by the overruling of defendant's demurrers to the first and second counts of the amended declaration herein, as will appear by reference to the points and authorities filed in support of and in opposition to the demurrers aforesaid.

WHITEFORD, MARSHALL,
HART & CARMODY
By P. H. MARSHALL
Attorneys for plaintiff

15

Stipulation

Filed November 14 1938

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*

*

It is hereby stipulated by counsel for plaintiff and for defendant that the following facts may be considered by the Court as a part of the record in the above entitled action, to the same extent as if said facts had been set forth in the pleadings, this stipulation being for the purpose of having the facts hereinafter set forth before the Court for such consideration as the Court may deem said facts entitled to receive in connection with the motion heretofore filed on behalf of plaintiff for judgment upon the pleadings. Said facts are as follows:

Mrs. Bernice Berman, referred to in the pleadings herein, was unknown to plaintiff bank, never had an account with said bank, nor any transaction with said bank prior to, or at the time of the discount of the notes described in the amended declaration, or to the issuance by plaintiff of the Cashier's checks therein described, nor was she present at the time of the discount of said notes, or at the time of the issuance of said Cashier's checks, which were handed by plaintiff bank to Arthur Berman.

Until the death of Mr. Arthur Berman and the discontinuance of monthly payments upon the promissory notes aforesaid and demand for payment thereof, made by plaintiff bank upon Mrs. Bernice Berman, plaintiff had no knowledge, notice or information that her name, as maker of said notes, and as endorser of said Cashier's checks, had been forged.

It is further stipulated that the amount which plaintiff claims to recover under the first count of the amended declaration should be \$709.30, instead of \$842.50, and under the second count thereof, should be \$377.34, instead of \$469.26, and that the total amount claimed under both counts should be \$1,086.64, instead of \$1,311.76.

WHITEFORD, MARSHALL,
HART & CARMODY
By P. H. MARSHALL
Attorneys for plaintiff

QUINTER AND SOTHORON
By L. HAROLD SOTHORON
P. MICHAEL COOK
Attorneys for defendant

Memorandum Opinion

Filed November 18 1938

*

*

*

I think that on the authority of District Nat. Bank vs. Washington Loan & Trust Co., 62 App. D. C. 198, and of Nat., Metropolitan Bank v. Realty Appraisal & Title Co., 60 App. D. C. 86, the motion of the plaintiff for judgment on the pleadings should be sustained.

BAILEY, J.

Judgment on Finding of Court

Filed November 23 1938

*

*

*

This cause having come on for hearing before the Court without a jury, on plaintiff's motion for Judgment on the

pleadings and stipulation of counsel filed herein on November 14, 1938, and after this cause is heard, the Court this 23d day of November, 1938, finds in favor of the plaintiff and that the money payable to the plaintiff by the defendant is the sum of One thousand Eighty-six dollars and sixty-four cents (\$1,086.64).

WHEREFORE, is it adjudged that the said plaintiff recover of the said defendant the sum of One thousand Eighty-six dollars and sixty-four cents (\$1,086.64),
17 together with the costs of this action.

CHARLES E STEWART
Clerk

By CHAS B. COFLIN,
asst clk

Notice of Appeal

Filed November 29 1938

*

*

*

Notice is hereby given this 28th day of November 1938, that THE CITY BANK hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of November, 1938, in favor of HAMILTON NATIONAL BANK OF WASHINGTON against said THE CITY BANK

QUINTER AND SOTHORON
By P MICHAEL COOK
Attorneys for defendant

Memorandum

DECEMBER 3-1938.

Cost Bond on appeal (\$250.00)—filed.

18 *Stipulation Designating Record*

Filed December 10 1938

*

*

*

It is hereby stipulated and agreed by and between the parties hereto by their counsel that the Clerk include in the Transcript of the Record on appeal the following:

- (1) Amended Declaration filed April 20, 1938.
- (2) Bill of Particulars filed February 25, 1938.
- (3) Demurrer to Declaration filed April 16, 1938.
- (4) Stipulation that Demurrer to Declaration shall stand as Demurrer to Amended Declaration, filed May 3, 1938.
- (5) Minute Entry overruling Demurrer.
- (6) Pleas to Declaration filed September 15, 1938.
- (7) Motion for Judgment on Pleadings, filed September 21, 1938.
- (8) Stipulation of Counsel filed November 14, 1938.
- (9) Opinion of Court filed November 18, 1938.
- (10) Judgment on Finding of Court filed November 23, 1938.
- (11) Notice of Appeal filed November 28, 1938.
- (12) This stipulation as to Record filed December 10th 1938.

WHITEFORD, MARSHALL,
HART & CARMODY

By P. H. MARSHALL
Attorneys for Plaintiff

QUINTER AND SOTHORON
By L. HAROLD SOTHORON
P. MICHAEL COOK

Attorneys for Defendant

19 District Court of the United States for the
District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 18, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 89911 at Law, wherein Hamilton National Bank of Washington, a corporation, is Plaintiff and The City Bank, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 20th day of December, 1938.

(Seal) C. E. STEWART,
Clerk.

Endorsed on Cover: No. 7311. The City Bank, Appellant, vs. Hamilton National Bank. United States Court of Appeals for the District of Columbia Filed Dec 29 1938
Joseph W. Stewart, Clerk

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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Joseph W. Stewart

CLERK

IN THE

United States Court of Appeals
THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1938

No. 7311

THE CITY BANK, *Appellant*,

v.

HAMILTON NATIONAL BANK OF WASHINGTON, *Appellee*.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

STATEMENT OF CASE.

The appellee, Hamilton National Bank of Washington, instituted suit in the lower court against the appellant, the City Bank, alleging that on November 16, 1936 at the instance and request of one Arthur Berman it discounted a certain promissory note signed by Arthur Berman and also purporting to have been signed by Mrs. Bernice Berman in the sum of \$1,213.20 payable \$33.70 on January 2, 1937 and a like amount on the 2nd day of each month until paid. Upon the

discount of said promissory note the appellee issued its cashier's check in the sum of \$1080.00 dated November 16, 1936 payable to the order of Arthur Berman and Bernice Berman. Said cashier's check endorsed with the names of the payees was deposited in the appellant bank, endorsed by appellant "prior endorsements guaranteed" and collected by the appellant bank from the appellee (R. 2). Appellee further alleged that Arthur Berman paid on the promissory note the sum of \$370.70 leaving a balance due thereon of \$842.50; that the purported signature of Mrs. Bernice Berman as maker of said promissory note and her purported endorsement of said cashier's check were forgeries and were not placed upon said instruments by her or with her knowledge, consent or approval and the appellee claimed the sum of \$842.50 (R. 2, 3).

The declaration contained a second count on another check which is identical with the exception of dates and amounts. In the second count the sum of \$469.26 is claimed. The two counts being identical the argument will be confined to the allegations of the first count.

To this declaration the appellant demurred upon the ground that the declaration did not allege any loss or damage to the plaintiff by reason of the alleged forged endorsement on the check (R. 9, 10). This demurrer was overruled with leave to plead (R. 10).

Thereafter, appellant filed its plea in which it alleged (R. 8, 11) that said cashier's check was deposited on November 17, 1936 for collection in the Georgia Avenue Branch of appellant bank at which time on the back of said cashier's check were written the names "Arthur Berman", "Bernice Berman", and "Arthur Berman", that it endorsed said check, received payment as alleged

and credited the same to the account of Arthur Berman subject to his order, which account had been opened by Arthur Berman several years before; that all of said sums were withdrawn prior to the filing of this action and before appellant had any notice or knowledge of the matters complained of; that the name Bernice Berman is the name of the wife of Arthur Berman; that appellee made no inquiry of Bernice Berman as to whether she had signed or authorized the signing of her name as maker of said promissory note or as endorser of said cashier's check; that the appellant had no notice or knowledge of the alleged forged endorsement until a short time before the suit was filed which was more than eleven months after the payment of said check (R. 11, 12); that neither the said Bernice Berman nor anyone claiming under her has asserted any claim against either the appellant or appellee for the proceeds of said check or any part thereof; that the appellant paid the proceeds of said check to or on the order of the identical person, to wit, Arthur Berman, who wrote the names "Arthur Berman" and "Mrs. Bernice Berman" on the promissory note discounted by the appellee; that the appellant paid the proceeds of said check to or on the order of the identical person, to wit, Arthur Berman, who the appellee intended should receive the proceeds of the discounted note; that Arthur Berman wrote the name "Mrs. Bernice Berman" on the promissory note as maker and on the cashier's check as endorser; that the appellee suffered no loss or damage from any act of the appellant; that its loss or damage if any resulted from its act in lending the sum of \$1080.00 upon the promissory note in the sum of \$1213.20 without making a proper or sufficient inquiry as to the genuineness of the signatures on said promissory note (R. 12).

Thereafter, appellee filed a motion for judgment on the pleadings (R. 14). While said motion was under consideration counsel filed in the cause a stipulation that Mrs. Bernice Berman was unknown to appellee bank, never had an account with said bank or any transaction with said bank prior to or at the time of the discount of the note described in the declaration or to the issuance by appellee of the cashier's check therein described; that she was not present at the time of the discount of said note or at the time of the issuance of the cashier's check, which was handed by appellee to Arthur Berman; that until the death of Arthur Berman and the discontinuance of monthly payments upon the promissory note and demand for payment thereof made by appellee upon Mrs. Bernice Berman appellee had no knowledge, notice or information that her name as maker of the note and as endorser of the check had been forged. It was further stipulated that the amount which should have been claimed under the first count was \$709.30 and under the second count \$377.34 (R. 16).

Subsequently the lower court filed a memorandum opinion that the motion for judgment on the pleadings should be sustained (R. 16). Pursuant to this opinion judgment was entered on November 23, 1938 by the clerk. From this judgment an appeal was prosecuted to this court.

ARGUMENT.

The argument in this case may be confined to two headings.

(1) The court erred in overruling appellant's demurrer to the declaration.

(2) The court erred in granting appellee's motion for judgment upon the pleadings.

I.

The demurrer to the declaration was based on the sole ground that it did not allege any loss or damage to the plaintiff by reason of the alleged forged endorsement on the check (R. 10). The appellee bank brought suit on the cashier's checks, but the declaration and each count thereof clearly shows that the loss if any suffered by the appellee bank results from the alleged forged signature upon the promissory note because of its inability to collect the balance due on said notes and not by reason of the alleged forged endorsement on the check. Arthur Berman, the declaration alleges, made regular payments on said note until the time of his death. Mrs. Bernice Berman the other payee on the check and the only person now entitled to the proceeds thereof has made no claim thereto. On the contrary the declaration shows that she disclaims any interest therein. Furthermore, the appellee brought suit in the first count for the sum of \$842.50, the balance due on the note, (R. 3) which was corrected by stipulation to credit on the amount of the check the amount paid by Arthur Berman to appellee bank on the note and making the amount then claimed \$709.30 (R. 16).

It is elementary that the failure of the declaration to allege damages renders it subject to demurrer. *Poe, Pleadings, Tiffany Edition, Section 584.*

In *Jolley v. Plant, et al.*, 1 Mac. 93, it was held that a declaration must contain as an essential requisite the allegation that the debt sued upon is still owing and unpaid, otherwise it is subject to demurrer.

As was stated in the case of *State of Nebraska v. State Journal Co.*, 106 N. W. 434, 75 Neb. 275.

"There is an allegation that the plaintiff has been damaged thereby in the sum of \$85,400, but

there is no allegation of fact from which it is made to appear that any such damage could have arisen. It is not alleged that the plaintiff would or could have realized any profit upon the sales that it might have made, if not prevented by the defendant; so that the statement that the plaintiff has been damaged would amount to an unwarranted conclusion; nor is there any allegation of fact from which it could be determined that the plaintiff was or could have been prevented from making sales by the fact that the defendant sold copies of these reports. * * * It follows that the facts alleged in this amended petition are neither sufficient to enable the plaintiff to recover damages from the defendant, nor to entitle it to any relief in equity. It was understood upon the argument that the plaintiff would not attempt to plead further. The demurrer to the amended petition is therefore sustained, and the cause dismissed."

Likewise in the case of *Jackson & Sharp Co. v. Fay*, 20 App. D. C. 105, 113, the Court, of which Chief Judge Alvey was a member, said:

"The defendant, having demurred, the facts alleged in the declaration with all the necessary and reasonable inferences therefrom must be accepted as true. * * *

"The final words of the declaration, that plaintiff 'has wholly lost' the money due it from Driscoll is a conclusion merely, without sufficient foundation in preceding allegations of fact. The entire allegation of damages is that, through reliance on the representations of the defendant, the plaintiff 'refrained from protecting itself by legal proceedings, as it could and would otherwise have done.' * * *

"We think the court was right in sustaining the demurrer and the judgment will be sustained with costs."

To the same effect—*Dunlop v. Munroe*, 7 Cranch 242, 3 L. Ed. 329; *Boyden v. Burke*, 14 How. 575, 14 L. Ed. 548.

See also *Thompson v. Gould*, 16 Abb. Prac. N. S. (N. Y.) 424, which holds that facts must be set forth in the complaint from which the court can infer that the plaintiff has sustained damage.

In *Washington Mechanics Savings Bank v. District Title Insurance Company et al.*, 62 App. D. C. 194, the title company brought suit against a collecting bank for the proceeds of a check collected by it upon a forged endorsement. An employee of the title company had stolen the check, forged the payee's endorsement, and cashed it at the defendant bank. The bonding company, as surety for the employee, reimbursed the title company in full for the amount of the proceeds of the check. The court held that, having been reimbursed, the title company had suffered no loss, and hence could not recover against the collecting bank, nor was the bonding company subrogated to the rights of the title company.

A similar situation appeared in the case of *Crane v. Postal Telegraph Cable Company*, 48 App. D. C. 54, 65, except that in this latter case the employee who forged the endorsements of the payee on the check used the proceeds thereof in payment of an indebtedness of the plaintiff telegraph company, the court saying:

“Assuming that Green had no right to act for the plaintiff in the receipt of the money from the defendants, and that their payment of it to him did not discharge their obligation to the plaintiff with respect to it, yet if they were able to prove, and the burden would be upon them, that Green had used the money for the benefit of the plaintiff, the latter could not recover. *This is so because in*

such circumstances the plaintiff would suffer no injury from the unauthorized conduct. Judge Taft, speaking for the circuit court of appeals in *Ditty v. Dominion Nat. Bank*, 22 C. C. A. 376, 43 U. S. App. 613, 75 Fed. 769, a case where the president of a bank had borrowed money without authority to conceal his prior embezzlements and devoted it to the use of the bank, said, referring to the bank: 'Having received the benefit through an agent, it is affected with the burden of the notice which that agent had of its reception, and therefore it became liable for money had and received to its use.' To the same effect are *Morse, Banks & Bkg.* sec. 440b; *Andrews v. Northwestern Nat. Bank*, 107 Minn. 196, 25 L. R. A. (N. S.) 996, 117 N. W. 621, 122 N. W. 499; *Bank of Lakin v. National Bank*, 57 Kan. 183, 45 Pac. 587." (Italics supplied.)

To the same effect is the case of *Industrial Savings Bank v. People's Funeral Service Corporation*, 54 App. D. C., 259, 260. There, the bank was authorized to pay checks of the plaintiff on deposit with it only when signed by the president and the treasurer. The bank paid certain checks on one signature only, but it appeared that the proceeds thereof were used in payment of obligations of the plaintiff. The trial court entered judgment for the plaintiff and the Court of Appeals, in reversing the same, said:

"Thus the amount paid upon the check went to discharge a debt of the corporation. About this there is no dispute. The court instructed the jury that the only question in the case was whether the bank was negligent in paying the check, and that, if it knew that the check should have been signed by the president and treasurer, and paid it 'without those two signatures', the verdict should be for the plaintiff. In this we think the court erred.

By paying the check a debt of the corporation was discharged; *therefore it sustained no damage by the act of the bank in paying it.* To support an action based on negligence there must be, not only the negligent act, but a consequential injury, which is the gravamen of the charge. *Ochs v. Public Service Railway Co.*, 81 N. J. Law 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912D 255. To this rule there is no exception so far as we know. Of course, if there was testimony tending to show that the corporation was damaged by the payment of the defectively signed check, a different question would be presented." (Italics supplied.)

See also *Scott et al. v. Most Worshipful Grand Lodge of Free Ancient and Accepted Masons et al.*, 57 App. D. C. 383, 384.

In *Land Title & Trust Company v. Northwestern National Bank*, 196 Pa. 230, 50 L. R. A. 75, 79, a suit on an alleged forged endorsement on a check, the Court said:

"But in order that a bank may recover, it must appear that it has sustained a loss. If it can charge the payment to the account of the depositor, it has lost nothing and has no cause of action."

See also *Beeson-Moore Stave Co. v. Clark County Bank*, 160 Ark. 385, 254 S. W. 667, 669; *Merchants National Bank v. Federal State Bank*, 206 Mich. 8, 172 N. W. 390, 391; *Andrews v. Northwestern National Bank*, 107 Minn. 196, 25 L. R. A. (N. S.) 996; *Hackensack Trust Company v. Hudson Trust Company*, 189 N. Y. S. 36, 37; *Dycus v. Commonwealth National Bank of Dallas* (Tex. Civ. App.) 148 S. W. 1127, 1129; *Weiler v. Marine National Bank*, 285 Pa. 23, 131 Atl. 495, 496.

If Arthur Berman had lived and paid the notes according to their tenor there certainly could be no

liability on appellant arising out of endorsement on cashier's check issued by appellee from the proceeds of the notes. Likewise after the death of Arthur Berman the appellee could collect from his estate the balance due on the note. No defense exists nor has any been suggested so far as Arthur Berman's liability or that of his estate is concerned.

It is equally obvious that had Arthur Berman pledged adequate security for the note the appellee could have realized the balance due on the note out of the collateral and of course this appellant would not have been liable to appellee on the cashier's check as an endorser.

Why should the failure or inability of Arthur Berman to pay the note create a liability on the cashier's check against the appellant? Does it not appear quite clear that the threatened loss to appellee flows from the acts of appellee in purchasing a promissory note from Arthur Berman which, perhaps, it cannot now collect in full? The act of appellant in endorsing the cashier's check did not affect the validity, or lessen the value, of the promissory note. This is not a case where someone is making claim to the proceeds of the check because of a forged endorsement. The record discloses that neither Mrs. Berman nor anyone else is making any claim to the proceeds of the cashier's check. The appellee still, so far as the record shows, owns the promissory note. It does not tender to appellant the note. So far as the record in this case is concerned the appellee has the legal right to recover from the estate of Arthur Berman the balance due on the note. If appellee were permitted to recover from appellant it would then be paid twice for the same obligation owing to it by Berman.

It is respectfully submitted that, while the appellee bank may have sustained a loss by reason of its inability to collect the balance due on the notes, it has not set forth any facts in the declaration or either count thereof which show that it sustained any loss or was damaged in any manner by the alleged forged endorsement on the checks.

In other words the appellee bank purchased these promissory notes from Arthur Berman. It still has exactly what it bought. The fact that the article it purchased subsequently turned out to be not as desirable as was anticipated certainly could not render an endorser on the check given in payment therefor liable for any depreciation in value or loss on the notes so purchased.

II.

The motion for judgment on the pleadings should have been denied. The appellee as heretofore stated brought suit upon the cashier's checks. The signature of Mrs. Bernice Berman is admittedly a forgery but the appellant alleged and the appellee admits by moving for judgment that it was written thereon by Arthur Berman. The appellee appears to rely on appellant's guaranty of prior endorsements. It seems to attribute some peculiar sanctity to the phrase, "Prior endorsements guaranteed". This phrase, however, is meaningless. The appellant bank would have had the same liability, if any, if it had endorsed in blank.

In *United States v. Guaranty Trust Company*, 293 U. S. 340, 79 L. Ed. 415, 421, a suit to recover the proceeds of a check drawn by the plaintiff on the defendant's guaranty of prior endorsements, it was contended that this phrase warranted the authenticity of

penmanship of the payee, or the authorization of endorsement in his name, but the Supreme Court, in denying this contention, said:

“The express guaranty of prior endorsements means no more than what is implied by every unrestricted endorsement.”

See also *Railroad Building & Loan Association v. Bankers Mortgage Company*, 142 Kans. 564, 102 A. L. R. 140, 144.

In the instant case the proceeds of the cashier's check were paid to the identical person whom the appellee bank intended should receive them. In view of the case, we think the decision in *Central National Bank v. National Metropolitan Bank*, 31 App. D. C. 391, is controlling. In that case a Miss Puckett assumed the name of Mrs. A. E. McKnight, who was the owner of certain real estate in the District of Columbia, and induced Wharton E. Lester to draw his check payable to the order of Mrs. A. E. McKnight, which check was endorsed by Miss Puckett in the name of Mrs. A. E. McKnight, Miss Puckett receiving the proceeds thereof. The Central National Bank, the drawee, paid the check and sued the defendant bank on its guaranty of prior endorsements. After an exhaustive review of the cases on this subject, the Court said (page 404):

“It is a principle of natural justice that, as between two innocent persons, the one whose act was the cause of the loss should bear the consequences. As the transaction in this case began with Lester, it was his duty to use diligence to ascertain the identity of the party with whom he dealt. Failing to make this discovery, he became the victim of a fraud. The impostor having succeeded in this first and essential step in the practice of the fraud, the next was comparatively an

easy one. The bank had a right to believe that Lester had acted with full knowledge of the party to whom he gave the check for the money, and its duty to him was discharged when it satisfied itself that the payment was intended to be made to the party who presented it."

And the Court concluded (page 406):

"Treating this case, as we must under the facts proved, as if the action was one by Lester to recover the money as paid to the wrong person, we think it would be unreasonable and unjust to permit him to escape the natural consequences of his own neglect or mistake, by holding the bank at fault for not making the complete inquiry that he ought to have made primarily to ascertain if the person to whom he gave the check was, in fact, the person whom he believed, and thus represented her to be."

The appellee contended in the lower court that the above case was overruled by the subsequent decision in *National Metropolitan Bank v. Realty Appraisal and Title Company*, 60 App. D. C. 86, and *District National Bank v. Washington Loan & Trust Company*, 62 App. D. C. 198 and the opinion of the lower court (R. 16) was based solely on the authority of these two cases.

In the *National Metropolitan Bank* case, *supra*, the Court specifically distinguishes the *Central National Bank* case, stating:

"She (Emelia Murray) never received the checks in question from Flanagan (the agent), nor did she endorse either of them or authorize Flanagan to endorse them for her, nor did she appear at any of the banks nor receive any of the proceeds of the checks. In these particulars, this case differs from *Central Nat. Bank v. National Metropolitan Bank*, 31 App. D. C. 391, 17 L. R. A. (N. S.) 520, and many of the cases cited therein."

The Court of Appeals (page 88) proceeds to cite the *Central National Bank case* as authority for the principal that as "between two innocent persons the one whose act was the cause of the loss should bear the consequences", and apparently based its decision against the paying bank on its negligence.

In the *District National Bank case*, supra, Madden, who forged Wholihan's name on the check cashed by the District National Bank, told the assistant cashier at the time the money was not his, but belonged to his brother-in-law, Wholihan, and later told the cashier "That is not my money", and "The whole thing belonged to Wholihan". In spite of these statements, the District National Bank retained the proceeds of the check, crediting same on Madden's overdue obligations to it. Of course, the Court based its decision on the ground that the miscarriage in that case was the result of the negligence of the District National Bank, rather than the neglect of the Building Association, the drawer of the check, and held that under the circumstances the Bank was not an innocent holder for value without notice of the infirmities of the paper.

It will thus be seen that these two later cases not only do not overrule the decision in the *Central National Bank case*, supra, but one in reality, while distinguishing it, reaffirmed the principles therein announced, while the other was decided on its own peculiar facts and circumstances. It will be noted also that in these two later cases, the person who perpetrated the fraud represented himself to be the agent of the person to whom the drawer intended the proceeds to go. In neither of these cases did the drawer intend the proceeds to be paid to the person who endorsed the payee's name on the instrument.

Arthur Berman in this case was a real person not an impostor, and the check was actually handed to Arthur Berman by the appellee. The *Central National Bank case*, supra, clearly distinguishes the class of cases where the check is delivered to the payee even though he be an impostor and the impostor endorses the assumed name on the check and those where the check is delivered to an agent of an impostor who endorses the impostor's name.

A case strikingly similar to the present one is *Arms & Drury, Inc. v. Columbia Title Ins. Co. of The District of Columbia* 62 App. D. C. 178. In that case one White, a colored real estate broker, applied to Arms & Drury for a loan secured by deed of trust on real estate. White represented himself to be the agent of Mrs. Wilhelmina Wunder, the owner of the property. The title was ordered from the Columbia Title Insurance Company who reported title good of record in Wilhelmina Wunder and William H. Wunder her husband. Several days later White came to Arms & Drury with a colored woman whom he introduced as Mrs. Wunder who stated that she was ready to execute a deed of trust and notes. They were told that Mr. Wunder would also have to sign the deed of trust. Arms & Drury gave them the papers which they later brought back signed with the names Wilhelmina Wunder and William H. Wunder. The colored woman was not Mrs. Wunder, who was really a white woman, a widow, whose husband William H. Wunder had been dead many years.

Arms & Drury issued its check, letter of instructions and deed of trust and handed same to White to be delivered to the Title Company. Some four months later Arms & Drury learned of the forgeries and brought

suit against the Title Company for the amount of the check. The lower court held in favor of the Title Company and on appeal this court in affirming the decision said:

“(1) We think the decision of the lower court was right. The case is governed by the rule that where one of two innocent persons must suffer a loss the one whose act was the cause of the loss should bear the consequences. As otherwise stated, the principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible. *Central National Bank v. National Metropolitan Bank*, 31 App. D. C. 391, 17 L. R. A. (N. S.) 520; *National Safe Deposit Company v. Hibbs*, 229 U. S. 391, 33 S. Ct. 818, 57 L. Ed. 1241.

“(2) The facts as disclosed by the evidence indicate that the appellant was the party whose misplaced confidence made possible the wrong herein complained of. The appellant was first deceived by the fraudulent misrepresentations of White and the spurious Mrs. Wunder. Appellant accepted these representations without sufficient investigation, and relied upon them as evidence of the identity of the colored woman as Mrs. Wunder. Appellant also accepted the signatures alleged to be those of Mr. and Mrs. Wunder upon the Deed of Trust and notes as genuine. Acting upon these assumptions, appellant sent the deed of trust by the hands of White and the spurious Mrs. Wunder to the appellee together with a check payable to the appellee for the amount of the loan for disbursement. The appellee was thereby led by appellant into the belief that the signatures upon the papers, which had been accepted by appellant, were genuine.

“The proceeds of appellant’s check therefore were distributed to or upon the order of the per-

son who was designated by appellant as the one entitled to receive the same. It is fair to assume from the circumstances that the appellant would have delivered the money to the same person had the disbursement been made by appellant at its own office. We therefore consider that as between appellant and appellee it was the appellant whose acts were the cause of the loss in question and whose misplaced confidence made the wrong possible. The loss, therefore, must fall upon it. *Drury v. Gorrell*, 44 App. D. C. 518, 529; *Moore v. Moore*, 47 App. D. C. 23; *Gray v. Jacobsen*, 56 App. D. C. 353, 13 F. (2d) 959, 48 A. L. R. 583."

Undoubtedly what happened in the instant case was that Arthur Berman applied to the appellee bank for a loan. He was possibly told that the loan would be made provided his wife Mrs. Bernice Berman signed the notes. He thereupon took the notes and returned later with same containing his genuine signature and that purporting to be the signature of his wife which he wrote on the note himself. The appellee accepted these signatures as genuine, issued its cashier's check and handed it to Arthur Berman the person the appellee intended should receive the proceeds of such check.

One of the leading cases on this subject, the facts of which were strikingly similar to those in the *Central National Bank case*, *Land Title & Trust Company v. Northwestern National Bank*, 196 Pa. 230, 50 L. R. A. 75, contains an exhaustive note showing this distinction. It will be noted in this case that plaintiff was both drawer and drawee, as was the Hamilton National Bank in the instant case. The Court observed, in refusing a judgment for the plaintiff, that the fraud was in effect consummated when the check was de-

livered. He would have received money instead of a check if he had asked for it.

In the case at bar, undoubtedly the appellee bank would have paid to Arthur Berman cash in payment of the promissory note it discounted if he had so requested, or it would have cashed the check for him upon its endorsement with the same signatures as those appearing on the note.

See also *McHenry v. Old Citizens National Bank*, 38 L. R. A. (N. S.) 1111, and note; and *Defiance Lumber Company v. Bank of California*, (Wash.) 99 A. L. R. 426, 433, where it was held that an impostor obtaining and endorsing a check under such circumstances was not guilty of forgery, but rather of obtaining money under false pretenses.

In *United States v. National Exchange Bank*, 45 Fed. 163, also cited with approval in the *Central National Bank* case, *supra*, an impostor obtained possession of post office money orders payable to another person. Inducing a person to believe that he was the payee and to identify him, a check was given him by the postmaster payable to the payee named in the orders. The impostor endorsed and cashed the check at the defendant bank. The court held that the defendant bank was not liable, giving as its reasons:

“The question for the bank is, ‘For whom was this money intended by the drawer?’—and the name is but one means of determining that question. * * * It was the duty of the department to ascertain the true individual, and to pay to no one else. *Without doubt the postmaster would have paid currency instead of a check, if he had had it in hand, rather than in bank. If he would not, it would be very good evidence of neglect to deliver a check to a party, and put it in his power to draw*

the money on a forged indorsement in circumstances where the postmaster would not have been satisfied to part with the cash. Allowing the drawer and drawee to be equally innocent, the loss should fall upon the one who, by his act, has been the occasion of the loss, which in this case, I think, was the department." (Italics supplied)

See also *E. S. Kroly Electrical Construction Co. v. Globe Savings Bank*, 64 Ill. App. 225; and *Hartford v. The Greenwich Bank*, 157 App. Div. 448, 142 N. Y. Supp. 387, affirmed on opinion below in 215 N. Y. 726, 109 N. E. 1007.

In *Montgomery Garage Company v. Manufacturers' Liability and Insurance Company*, 94 N. J. L. 152, 22 A. L. R. 1224, it was held that a purchaser of a check containing an endorsement placed thereon by an impostor under such circumstances was a holder of the check in due course, and, having paid the full amount agreed to be paid therefor before receiving notice of any infirmity in it or defect in the title of the person negotiating it, may recover against the drawer.

There are several state decisions which hold the bank which cashed the checks liable as against the drawer Bank. But these Courts are fairly unanimous in adhering to the principle of the *Central National Bank case*, supra, that "as between two innocent persons, the one whose act was the cause of the loss should bear the consequences." Generally the cashing bank is held liable because of its negligence in not using due diligence to ascertain the identity of the person presenting the check for payment. This cannot be said of the appellant in the instant case. Arthur Berman had had an account in appellant bank for several years, and when the said cashier's check was deposited therein it

contained his genuine endorsement following that of the payees. Certainly appellant bank was not negligent in accepting such a check for deposit to his account.

The alleged forged checks in the instant case were cashier's checks.

A cashier's check is a bill of exchange drawn by a bank upon itself and accepted in advance by the act of its issuance. It is a primary obligation of the bank. It becomes the obligation of the issuing bank as much so as if the bank had given a promissory note instead of its check. *Polotsky v. Artisans Savings Bank* (Dela.), 107 A. L. R. 1458, 1461. It is a promissory note payable on demand. 7 *Am. Jur.* 379; *Madison & K. State Bank v. Madison Square State Bank*, 271 Ill. App. 12; and the rights and obligations as to a cashier's check are those of a payee and maker of a promissory note payable on demand; *Drinkall v. Movius State Bank* (No. Dak.), 57 L. R. A. 341, 344.

In the case at bar, when the appellee bank issued its cashier's check to Arthur Berman and Mrs. Bernice Berman, the rights and liabilities of the parties to said checks were as if the appellee bank were the maker of a demand promissory note, and Mr. and Mrs. Berman the payees. There is no question of consideration, because the cashier's checks were issued in payment of the notes it discounted. At this point, Mr. and Mrs. Berman alone had a right of action against the appellee bank on its debt, as evidenced by its demand note. It is admitted that Arthur Berman received the proceeds thereof. Mrs. Berman, it is alleged in the plea, has not nor has anyone claiming under her asserted any claim against the appellee or this appellant for the proceeds of said checks or any part thereof. If the

Bermans received the proceeds of the appellee bank's demand note, the debt evidenced by said promissory note has been extinguished. If not, either in whole or in part, the appellee bank is still indebted as maker to the payees of said note. However, the payees on the note have been paid by negotiating it to the City Bank, which paid full value and which received the proceeds from the maker, the appellee bank. The debt evidenced by such a note has therefore been extinguished. It certainly requires no argument to show that a maker of a demand promissory note which has been paid cannot thereafter sue an intermediate endorser.

It is respectfully submitted that the plea of the appellant bank, which sets out that the appellee bank made no inquiry as to whether Bernice Berman signed her name to the promissory notes or cashier's checks and therefore did not use due diligence; that appellant had no knowledge or notice until more than eleven months after the payment of the checks; that neither Bernice Berman nor anyone claiming under her assert any rights to the proceeds of said checks; and that appellant paid the proceeds to the identical person whom the plaintiff intended to receive same, sets up a good defense to the appellee's supposed cause of action, and its motion for judgment on the pleadings should have been denied.

It will be noted that the judgment of the lower court was signed by the Clerk (R. 17) and not by the Justice of the lower court who heard the case. It is respectfully suggested that under Rule 58 of the Rules of Civil Procedure the judgment or order should be signed by the Justice who heard the case. This rule recites that the Court directs the entry of judgment by the Clerk. Such entry of judgment by the Clerk,

under Rule 79a, is merely a brief notation of the nature of the order or judgment of the Court and was not intended to mean that the Clerk should sign the actual judgment or order of the Court.

CONCLUSION.

It is respectfully submitted that the demurrer to the declaration upon the ground that the appellee suffered no loss by reason of any endorsements on the check should have been sustained, the motion for judgment upon the pleadings should have been denied and the decision of the lower court should be reversed.

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P. MICHAEL COOK,
Attorneys for Appellant.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED MAR 20 1939

Joseph W. Stewart

CLERK

IN THE
United States Court of Appeals
THE DISTRICT OF COLUMBIA.

October Term, 1938.

—
No. 7311.
—

THE CITY BANK, *Appellant*,

v.

HAMILTON NATIONAL BANK OF WASHINGTON, *Appellee*.

—
APPELLEE'S BRIEF.
—

ROGER J. WHITEFORD,
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APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

While appellant's statement of this case is substantially correct, we ask the attention of the Court to the fact that the amended declaration, in each count, alleges that the purported signature of Bernice Berman as maker of the promissory notes described in said counts, and her purported endorsements of the cashier's checks likewise described in said counts are forgeries; that she has declined to pay anything on ac-

count of the sums claimed to be recovered against appellant, and that no part of the amounts claimed to be recovered from appellant in the first and second counts, nor any interest thereon, has been paid (R. 2-3).

It further appears that by stipulation of counsel, the demurrer filed to the original declaration was to stand as a demurrer to the amended declaration (R. 10).

ARGUMENT.

Counsel for appellant assigned in their brief only two alleged erroneous rulings by the Justice presiding in District Court.

RULING ON DEMURRER.

The first alleged error by the District Court relates to the action of the Justice of that Court in overruling appellant's demurrer.

We again ask the attention of this Court to the fact that in considering the demurrer, the Court had before it the amended declaration, pursuant to stipulation of counsel (R. 10), and that the amended declaration clearly alleged that Arthur Berman died on or about November 19, 1937; that the purported signature of Bernice Berman as maker of the notes and as endorser of the facts was a forgery, and that no part of the balance due appellee, nor any interest thereon, had been paid (R. 3-4).

Appellant contends that the loss suffered by appellee resulted from the forged signatures upon the promissory notes, and not because of the forged endorsements on the cashier's checks. This contention ignores the fact that if the cashier's checks, which represented the loan made by appellee and evidenced by the notes, had

not been accepted by appellant upon a forged endorsement, and paid by appellee upon endorsement by appellant guaranteeing all prior endorsements, appellee would have suffered no loss. Until the consideration for the loan passed out of the possession of appellee, no damage was sustained by appellee, and the Hamilton National Bank parted with the consideration for the loan upon a forged endorsement, guaranteed as a valid endorsement by appellant bank. Had this not happened, appellee would have been the holder of promissory notes, worthless as against the co-maker, Bernice Berman, but would not have parted with the money loaned upon the faith of said notes because of the guarantee of appellant of the genuineness of the endorsement of Bernice Berman upon the cashier's checks.

In this connection, it appears from the stipulation of counsel (R. 15) that Bernice Berman was unknown to appellee, never had an account with appellee, nor any transactions with appellee, and was not present at the time of the discount of the promissory notes, nor at the time of the issuance of the cashier's checks.

Counsel for appellant, in support of their contention that their demurrer should have been sustained because of failure to allege damages, cited Poe on pleadings, Tiffany edition, Section 584. We do not contend to the contrary, but submit that the cases cited by our adversaries are not in point.

In *Jolley v. Plant, et al.*, 1 Mac. 93, the Court held it to be essential to allege that the debt sued upon is still owing and unpaid. In each count of the amended declaration in the case at bar it is alleged that no part of the amount sued for, nor any interest thereon, has been paid, which allegation leaves the indebtedness still owing and unpaid.

State of Nebraska v. State Journal Co., 102 N. W. 434, 75 Neb. 275, is not in point, the allegation that plaintiff in that case was damaged in the sum of Eighty-five Thousand Four Hundred Dollars (\$85,400.00) being a mere conclusion, and the Court stating that the declaration contained no allegation of fact from which it was made to appear that ~~any~~ such damage could have arisen.

The same principle was involved in *Jackson & Sharp Co. v. Fay*, 20 App. D. C. 105, in which the Court held that the allegation that plaintiff "has wholly lost" the money claimed to be due, was a mere conclusion, unsupported by any allegations of fact.

Dunlop v. Munroe, 7 Cranch. 242; *Boyden v. Burke*, 14 How. 575; and *Thompson v. Gould*, 16 Abb. Prac. N. S. (N. Y.) 424.

The case of *Washington Mechanics Savings Bank v. District Title Insurance Company, et al.*, 62 App. D. C. 194, is directly in line with the other decisions cited by counsel for appellant upon the necessity of alleging (and proving) damages. The Bonding Company, as surety for the employee who had stolen the check involved in this case, and had forged the endorsement of the payee thereon and cashed the check at defendant bank, had reimbursed the Title Company in full, for which reason this Court held that the Title Company had suffered no loss, and therefore could not recover against the Savings Bank.

Crane v. Postal Telegraph Cable Company, 48 App. D. C. 54, adheres to the same principle in holding that inasmuch as the money improperly obtained had been used for the benefit of plaintiff, plaintiff had actually suffered no damage and therefore could not recover; and exactly the same principle was involved in *Indus-*

trial Savings Bank v. People's Funeral Service Corporation, 54 App. D. C. 259, and in each of the other cases cited upon the same point in appellant's brief.

Counsel for appellant, in connection with their first claim of error, indulged in speculation as to what would or might have occurred had Arthur Berman lived and paid the notes according to their tenor. As he did not live, and as the notes were not paid, there would appear to be no occasion for reply concerning a hypothetical situation contradicted by the record itself.

Opposing counsel also suggest that appellee bank could collect from the estate of Arthur Berman the balance due on the note. Aside from the fact that the record fails to disclose that Arthur Berman left any estate, it was held in *Yatesville Banking Co. v. Fourth National Bank*, 10 Ga. App. 1, that when a negotiable instrument containing an express warranty that all prior endorsements are genuine is paid, the bank making such payments may recover upon the guarantee of prior endorsements, notwithstanding that some of the signatures so guaranteed may be genuine, and that the instrument may not be worthless from a commercial standpoint.

We also fail to see occasion for theorizing as to what would have happened if Arthur Berman had pledged adequate security for the notes. Had there been adequate collateral, appellee would not have been damaged, but this is not the situation disclosed by the record. Nor is the fact that Bernice Berman makes no claim to the proceeds of the cashier's checks of any consequence. Her alleged endorsements thereon were forgeries, the entire proceeds from said cashier's checks were deposited by appellant to the credit of Arthur Berman, and all of said proceeds withdrawn

from the account of Arthur Berman in appellant bank on the order of Arthur Berman (R. 11). It thus appears that appellant bank received these checks for collection from Arthur Berman, who forged the name of Bernice Berman, co-payee, thereon, without any knowledge or inquiry as to the genuineness of her endorsements, guaranteed the genuineness of her endorsements, and placed the proceeds of these checks at the disposal of Arthur Berman, who drew said proceeds upon his individual checks. Under these circumstances, it is difficult to see how Bernice Berman could have claimed the proceeds of these checks, or why the rights of appellee can be affected by her failure so to do.

Comment is also made upon the fact that appellee still has the promissory notes, and has not tendered these to appellant. As appellant is not an endorser upon the notes, nor has it guaranteed the genuineness of the signature of any party thereto, but is a complete stranger to the notes, there exists no reason for a tender of the notes to appellant, and as Bernice Berman has repudiated all connection with the notes, and also with the cashier's checks, and has made no demand for their delivery to her, there appears no occasion for such tender. As an additional argument to this contention, it was held in *Yatesville Banking Co. v. Fourth National Bank*, 10 Ga. App. 1, (hereinbefore cited upon another point) that recovery may be had upon a warranty without tender of the return of the instrument, because to part with the instrument containing the warranty would be to part with evidence.

The suggestion that if appellee were permitted to recover from appellant, it might also recover from the hypothetical estate of Arthur Berman is entirely without merit. If Arthur Berman were living and solvent,

a payment of a judgment against him alone would be a complete satisfaction of the entire indebtedness, and a bar to any other suit for the recovery of the same money.

Title 24, Section 251, of the District Code, permits separate actions against persons jointly and severally obligated for the payment of money, and Section 261 of the same Title makes all contracts entered into between two or more persons joint and several contracts.

We believe that we have heretofore demonstrated that appellee sustained no loss until it parted with the money loaned upon the notes, and that it parted with this money when it cashed the checks representing the money so loaned upon the guarantee by appellant of the validity of the prior endorsements of Bernice Berman, as well as of the validity of the prior endorsements of Arthur Berman.

RULING ON MOTION FOR JUDGMENT.

In discussing the alleged error of the District Court in granting appellee's motion for judgment upon the pleadings, counsel for appellant admits that the signatures of Bernice Berman are forgeries committed by Arthur Berman, and refers to the decision in *U. S. v. Guaranty Trust Company*, 293 U. S. 340, in which the Court held that the express guaranty of prior endorsements means no more than what is implied by every unrestricted endorsement. We fail to see how this is helpful to appellant, for it amounts to saying that an unrestricted endorsement amounts to an express guaranty of prior endorsements.

Opposing counsel also state that the proceeds of the cashier's checks were paid to the identical persons intended by appellee to receive them. The record shows

that the checks in question were drawn to the order of Arthur Berman and Bernice Berman (R. 6-8), and it follows necessarily that these were the persons intended to receive the proceeds of the checks. The record further shows that Arthur Berman alone received these proceeds, and withdrew them on his personal checks (R. 11-13).

The very fact that appellee bank made these checks payable to Arthur Berman and Bernice Berman conclusively negatives the fact that appellee intended the proceeds for Arthur Berman alone, and as the record further shows (R. 15) that Bernice Berman was unknown to appellee bank, never had an account with appellee, nor any transaction with it prior to or at the time of the discount of the notes or the issuance of the cashier's checks, and that she was not present when the notes were discounted or the cashier's checks issued, it would seem that a wise precaution was taken by appellee in drawing the checks so as to require her endorsement thereon.

The case of *Central National Bank v. National Metropolitan Bank*, 31 App. D. C. 391, which counsel for appellant refer to as controlling, appears to us to be readily distinguishable from the case at Bar. In that case, Mr. Wharton Lester was induced to make a loan to a woman who represented herself to him to be a Mrs. McKnight, and the owner of certain real estate. She was not the real Mrs. McKnight. Lester relied upon her representation as to her identity and agreed to make the loan. He issued his check, payable to the order of this imposter, and delivered the check to one Marshall who, in good faith, and with knowledge that she was the woman with whom Lester had been dealing, introduced to her the officers of the bank upon

which the check was drawn and thereby enabled her to cash the check. The Court held that under these circumstances it was not reasonable to require the bank to make any further inquiry; that Lester no doubt would have identified her to the bank as the payee of the check had Marshall not been present, and that Lester's conduct, which led Marshall to identify the payee and enable her to cash the check had the same effect, under the circumstances, as an introduction by Lester in person.

It was because of the facts and circumstances involved that the Court applied the principle that as between two innocent persons, the one whose act was the cause of the loss should bear the consequences.

Counsel for appellant is in error in stating that counsel for appellee contended in the Lower Court that the foregoing case was overruled by subsequent decisions of this Court, as we contended there, as we contend here, that the facts of that case are clearly distinguished from the case at Bar.

In *National Metropolitan Bank v. Realty Appraisal and Title Company*, 60 App. D. C. 86, a loan had been made upon the security of a second trust on property owned by Emelia Murray. The broker procured another woman to impersonate Emelia Murray, and this woman forged the signature of Emelia Murray upon the papers connected with the loan. The title company issued its check to the order of Emelia Murray and delivered it to the agent, who forged the signature of the payee and deposited the check in his personal bank account, the bank guaranteeing prior endorsements and sending the check for collection to the National Metropolitan Bank, the drawee.

After payment of the check and discovery of the fraud, the title company sued the National Metropolitan Bank, and the Court of Appeals, in affirming the Municipal Court, sustained the right of the title company to recover, saying, "Where a check is drawn payable to the order of any actually existing person or corporation, if the order or endorsement of such payee is forged, payment by the bank is no acquittance. In such case the depositor has directed payment to be made in a certain manner; and payment made otherwise than according to his direction is no discharge of the bank's obligations toward him. Neither has the holder under a forged endorsement any title to the paper, or any right to receive payment of it".

In its opinion, the Court approved the following language from the case of *Atlanta National Bank v. Burke*, 81 Ga. 597: "That Burke was himself imposed upon by the forgery by Knapp of the name of Knapp's wife as maker and guarantor of a note and deed would not preclude Burke from complaining of the payment by a bank of a check drawn upon it by Burke in favor of Mrs. Knapp to Knapp, upon a forged endorsement by Knapp of her name upon said check, nor is it true that because Knapp's own endorsement was genuine and followed the forged endorsement of his wife's name and he was the last endorser, the bank was not bound to look to the genuineness of her endorsement".

The case of *Arms & Drury v. Columbia Title Insurance Company*, 62 App. D. C. 178, also cited by counsel for appellant, is distinguishable from the case at Bar as involving facts which brought that case within the rule applied in *Central National Bank v. National Metropolitan Bank*, *supra*. In each case there was a misrepresentation as to the ownership of the property,

and in each case the woman represented as the owner assumed the name of the real owner. In the *Arms & Drury* case, the Corporation was engaged in the business of making real estate loans, and agreed to make a loan to a woman who misrepresented herself to be the owner of the real estate upon which the loan was to be secured. Arms & Drury obtained a preliminary report from the Title Company showing that according to the records this woman and her husband had good title to the property. Arms & Drury then prepared a deed of trust and notes securing the loan, and a colored woman who represented herself as the owner of the real estate came to their office to execute the deed of trust and notes, and was informed that her husband was a necessary party. Arms & Drury were told that the husband worked in Virginia and could not come to their office until after five o'clock, but that arrangements could be made to have the papers executed elsewhere. Thereupon, the agent of Arms & Drury delivered the papers, which were later returned, purporting to contain the signatures and acknowledgements of the borrower and her husband, whereupon the agent of Arms & Drury, in ignorance of the fraud, sent the deed of trust and check for proceeds of the loan to the Title Company, with instructions to disburse the proceeds of the check upon furnishing a certificate showing title good and said trust to be a first lien on the real estate. The letter of instructions, deed of trust and check were delivered by the agent of Arms & Drury to one White, party to the fraud, for delivery to the Title Company, where settlement was made later and checks delivered to White for distribution.

This Court held that the conduct of the agent of Arms & Drury in sending to the Title Company the

trust deed, notes, check and instructions to disburse made possible the accomplishment of the fraud, and that the Title Company, under the circumstances, had been led to the belief that the signatures upon the deed of trust and notes, which had been accepted as genuine by Arms & Drury, were in fact genuine.

We assert that the law is well settled that a bank upon which a check is drawn is not obliged, when that check is presented for payment through another bank which has guaranteed the genuineness of all prior endorsements, to ascertain at its peril the genuineness of such prior endorsements, or to assure itself that the endorsement purporting to be that of the payee is genuine.

In *District National Bank of Washington v. Washington Loan and Trust Company*, 62 App. D. C. 198, one John J. Madden represented himself to be Patrick J. Wholihan, the owner of certain real estate, and under that representation obtained a loan from the Equitable Cooperative Building Association. The building association issued its check for the loan, payable to Wholihan, and Madden obtained the check, endorsed Wholihan's name thereon, and deposited the check in the District National Bank, which stamped the check "Pay to the order of any bank or trust company, prior endorsements guaranteed, September 25, 1926, District National Bank, Washington, D. C.", and presented it to the Washington Loan and Trust Company, the drawee.

Upon discovery of the fraud, the building association returned the check to the Washington Loan and Trust Company, which brought suit against the District National Bank.

A verdict was directed for the plaintiff, and judgment on that verdict affirmed by the Court of Appeals which, in its opinion, cited Section 1327 of the D. C. Code: "Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery for want of authority".

The Court also referred to the rule laid down in *Morse on Banks and Banking*, Vol. 2, Section 474, that where a check is drawn payable to the order of any actually existing person, if the endorsement of such payee is forged, payment by the bank upon the forged endorsement is no acquittance, and that a holder under a forged endorsement has no title to the paper or any right to receive payment of it. The Court further said that defendant bank "required no identification of the signature of Wholihan, but relied upon its acquaintance with Madden and its confidence in him", and that the bank "guaranteed to the drawee, the trust company, that the endorsements were genuine, and thereby relieved it, as well as the building association, from the necessity of requiring any proof of their genuineness, and could not complain if these parties relied upon its written guarantee".

Both the amended declaration and the pleas in the action at Bar disclose that Bernice Berman is a living person.

In above case it appeared, as in the case at bar, that Madden had made payments upon the loan made by

the building association, and the District Bank was credited with the amount of these payments.

Another decision of our Court of Appeals is *Central National Bank v. National Metropolitan Bank*, 31 App. D. C. 391, in which the Court of Appeals denied the right of the drawee bank to recover against the bank in which the check had been deposited, upon the ground that the drawee bank, upon demand of its depositor, had paid him the amount of the check, and thereby had recognized the right of the depositor to the return of the money as having been improperly paid. In this case, the drawer of the check had delivered it to a woman, supposing her to be the person whose name she assumed. The Court of Appeals held that, under the circumstances of that case, plaintiff bank was in no better position than the maker of the check, and as the Court was obliged to treat the case as if the maker of the check were the plaintiff, and that under the facts he had been guilty of negligence, it would be unjust to permit his failure to make proper inquiry as to the identity of the person to whom he delivered the check to impose a liability upon the bank in which it was deposited.

The principle here involved was stated by Chief Justice Taney in *Horstman v. Henshaw*, 11 How. 182, as follows: "The general rule undoubtedly is that a drawee, by accepting the bill, admits the handwriting of the drawer, but not of the endorser. And the holder is bound to know that the previous endorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorized by them. And if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at

the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterward discovered, he will be compelled to repay it. The reason of the rule is obvious. A forged endorsement can not transfer any interest in the bill, and the holder therefore has no right to demand the money."

In the case at bar, it appears in the record that appellee bank had no means of verifying the endorsements of Bernice Berman. The record discloses that she never had been a depositor in appellee bank, was not present when the notes were discounted or the checks delivered, and never had any transactions with appellee.

None of the cases imposes upon a drawee bank any greater burden than that it must know the signature of its depositor, and pay a check drawn upon the account of a depositor at the risk of being obliged to know his signature. But all of the cases agree that such bank is not obliged to know the signature of the payee of a check forwarded through another bank, but can rely upon the presumption that the forwarding bank, before accepting the check, exercised sufficient care and diligence to assure itself that the person from whom it accepted the check had a good title thereto.

In *Farmers' Bank and Trust Co. v. Farmers' State Bank*, 148 Ark. 599, plaintiff bank issued its cashier's check to a customer who had previously done business with plaintiff bank, but had moved from Brookport, Illinois, where he had had an account in plaintiff bank, to Blytheville, Arkansas. He had sold some property prior to such removal, and plaintiff bank mailed its cashier's check for the proceeds of this sale to his new address, namely, Blytheville, Arkansas, R. F. D. No. 1. A negro presented this check to defendant bank, en-

dorsed with the name of the payee, and represented himself as the payee. Defendant bank cashed the check and placed the proceeds to the credit of this negro, who withdrew a portion thereof, and left the balance on deposit.

The endorsement was a forgery, and when defendant bank was informed of this fact, it paid to plaintiff bank the balance on deposit, but refused to pay the amount drawn by the forger. Defendant bank, in forwarding the check for collection had endorsed it with a guaranty of prior endorsement, and it had been paid by plaintiff bank.

The Court held that a bank issuing a cashier's check was both the drawer and the drawee; that it was not required to know the signature of endorsers, even though, in this instance, the payee had been a depositor; that application of the principle that as between two innocent parties, the loss must fall upon the one whose acts most contributed to produce it, required the loss to fall on the defendant bank.

In *First National Bank v. Northwestern National Bank*, 152 Ill. 296, the Court held that a bank endorsing and collecting a check warrants the genuineness of all previous endorsements thereon, including the endorsements of the respective payees named in such check, and is answerable for moneys received by it if any such endorsements are forgeries; that if plaintiff bank could be said to have been guilty of any negligence whatever, its negligence, in a measure was superinduced by the endorsement of defendant bank, which was calculated to lull plaintiff into a sense of security in reliance upon such endorsement and thereby lessen the diligence which it would doubtless otherwise have exercised.

In *Yatesville Banking Co. v. Fourth National Bank*, 10 Ga. App. 1, it is held that the drawee of a negotiable instrument who pays it to a person holding under a forged endorsement of the payee's name, may recover on an express warranty that all prior endorsements are genuine. This case also held that the drawee must give timely notice of the forgery, but that failure to do so is an affirmative defense, and the giving of notice need not be alleged in the declaration. The Court held that the person paying a negotiable instrument upon the express warranty of the person presenting it that all prior endorsements are genuine (the warranty being written on the instrument itself) may recover from his warrantor without showing that he has returned or tendered the instrument, notwithstanding that some of the signatures may be genuine and the instrument may not be worthless from a commercial standpoint, but that the instrument may be held as evidence until reimbursement has been made or tendered.

The above case is authority for our proposition that we may recover upon the guaranty of all prior endorsements placed upon these cashier's checks by the City Bank, without reference to the promissory notes, but because plaintiff bank has been damaged by parting with its money upon the faith of this guaranty.

In *First National Bank of Danvers v. First National Bank of Salem*, 151 Mass. 280, a forged check purporting to be drawn upon a bank by one of its customers was payable to a named payee or bearer. Another bank, of which the drawer was not a customer, paid the check to an unknown person without identification. The drawee negligently failed to discover the forgery

for a month or two and then notified the bank which cashed the check. The Court held that the latter bank must bear the loss. This case held the bank which cashed the check liable, although the purported signature of the maker of the check was a forgery and such maker was a customer of plaintiff bank.

In *First National Bank of Chicago v. Northwestern National Bank of Chicago*, 152 Ill. 296, it was held that the drawee of a bill or check, being bound to look only at its face, by accepting and paying it, admits the genuineness of the drawer's signature only, and is not estopped to deny the genuineness of endorsements; that where a drawee pays a bill or check to an endorser, who derives title through a prior forged endorsement, the drawee may recover back the money, provided demand is made within a reasonable time after discovery of the forgery.

In *Farmers' National Bank of Augusta v. Farmers' and Traders' Bank of Maysville*, 159 Ky. 141, the Court held that a bank is required to know the signature of its depositor, and if it pays a check of a depositor, it thereby admits the genuineness of his signature, but that a drawee bank is not required to know the signature of an endorser; that the holder is bound to know that previous endorsements, including that of the payee, are genuine; that where a bank cashed a check drawn on another bank without requiring identification of the holder who endorsed the check and the check was forwarded to the drawee bank and paid by it, and it subsequently appeared that the names of the drawer and endorser were both forged, the drawee bank was entitled to recover the amount of the check from the bank which took the check under the forged endorsement.

In *Peoples Bank v. Franklin Bank*, 88 Tenn. 299, it was held that a bank that has negligently cashed a forged check purporting to be drawn upon another bank, the names of both the maker and the endorser of the check having been forged thereon, and the cashing bank thereupon endorses the check and receives payment thereof from the drawee bank, such cashing bank is liable to the drawee bank for the amount received. The Court said that the general rule was that a bank must know the signature of its depositor, but that this rule applies only where the party to whom payment has been made is without fault. In this case the defendant bank did not know whether it had required any identification of the person to whom it had paid the check, and the Court said that being negligent in this regard, it could not avail itself of the rule requiring the drawee bank to know the signature of its depositor, and also held that by endorsing the check, the cashing bank warranted the genuineness of all prior endorsements thereon.

There would appear to be no conflict in the authorities holding that a drawee bank may rely upon a warranty or a guaranty of prior endorsements as against the guarantor; that it may sue for any loss sustained by reason of the breach of this contract of guaranty; that it may retain the instrument sued on as evidence of the guaranty until reimbursement is made or tendered; that the fact that the genuine signature of other parties appear upon the instrument, and that it is not without value, is immaterial, because the guaranty is breached when it appears that a prior endorsement is not genuine; that it is entitled to recover the amount paid out in reliance upon this guaranty; that plaintiff does not have to allege prompt notice of the for-

gery, or absence of injury to defendant by reason of delay in such notice, but such matters are defenses, which must be specially pleaded and proved.

ENTRY OF JUDGMENT.

As to the manner in which the judgment was entered below, we suggest:

1. No objection to such entry appears in the record.
2. The manner of entering the judgment is not assigned as error.
3. If there was error in the entry of judgment, such error is not harmful.
4. Appeal was taken from the judgment, which recognized it as valid.

5. Federal Rule 58 directs that a judgment for money only shall be entered by the Clerk, by direction of the Court. The memorandum opinion of the District Court (R. 16) sustained the motion for judgment on the pleadings, and was a sufficient direction to the Clerk.

For the foregoing reasons, and upon the foregoing authorities, the granting by the District Court of the motion for judgment upon the pleadings was not error.

Respectfully submitted,

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